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DEC 27

MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-933

SCOTT LEISNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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NO. _____

SCOTT LEISNER,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Scott Leisner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1972.

OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto and is designated as Appendix "A."

The petition for rehearing filed by the Defendant Leisner was denied on November 27, 1972. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B." No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on November 2, 1972. A timely petition for rehearing was denied on November 27, 1972, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether or not Title 21 U.S.C. §841 and §846 (§401(a)(1) and §406 of Title II of the Comprehensive Drug Abuse, Prevention and Control Act of 1970) are unconstitutional in that Congress was without power under the Commerce Clause, Article I, §8, of the Constitution to promulgate the said sections, and as being an invasion of the States' residual police powers contrary to the Tenth Amendment.

(a) Whether Congress exceeded the power granted by the Commerce Clause by prohibiting and making unlawful particular activities in controlled substances without requiring both allegation and proof that the particular activity involved in each individual case has affected interstate commerce.

(b) Whether there was no rational basis for the Congressional findings and declarations set forth in Title II of the Act (21 U.S.C. §801).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution,
Article I, §8, Clause 3:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Tenth Amendment to the
Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Code, Title 21:

> "Section 841(a)(1) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufac-

ture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

"Section 846 Any person who attempts or conspires to commit any offense defined in this Title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

On March 9, 1972, the Petitioner, SCOTT LEISNER, was charged by Indictment with a violation of Title 21, United States Code, §§841(a)(1) and 846, a copy of said Indictment is attached hereto and marked Appendix "C." Thereafter, the Petitioner filed pre-trial motions, including a Motion to Dismiss, and a Supplementary Motion to Dismiss, challenging the constitutionality of the United States Code provisions under which he was charged. On May 3, 1972, the Defendant entered a plea of nolo contendere as to Count 4 of the Indictment, charging a violation of Title 21, United States Code, §841(a)(1). This plea was entered based on a plea bargaining agreement between the Defendant and the Government which allowed him to test the constitutionality of the United States Code provisions under which he had been charged.

The Defendant was adjudicated guilty by the Court based on this plea, and was sentenced to 15 months imprisonment to be followed by a special additional parole term of 3 years.

REASONS FOR GRANTING WRIT

I

TITLE 21 U.S.C. §841 AND §846 (§401(a)(1) AND §406 OF TITLE II OF THE COMPREHENSIVE DRUG ABUSE, PREVENTION AND CONTROL ACT OF 1970) ARE UNCONSTITUTIONAL IN THAT CONGRESS WAS WITHOUT POWER UNDER THE COMMERCE CLAUSE, ARTICLE I, §8, OF THE CONSTITUTION, TO PROMULGATE THE SAID SECTIONS, AND AS BEING AN INVASION OF THE STATES' RESIDUAL POLICE POWERS CONTRARY TO THE TENTH AMENDMENT.

(a) CONGRESS EXCEEDED THE POWER GRANTED BY THE COMMERCE CLAUSE BY PROHIBITING AND MAKING UNLAWFUL PARTICULAR ACTIVITIES IN CONTROLLED SUBSTANCES WITHOUT REQUIRING BOTH ALLEGATION AND PROOF THAT THE PARTICULAR ACTIVITY INVOLVED IN EACH INDIVIDUAL CASE HAS AFFECTED INTERSTATE COMMERCE.

(b) THERE WAS NO RATIONAL BASIS FOR THE CONGRESSIONAL FINDINGS AND DECLARATIONS SET FORTH IN TITLE II OF THE ACT (21 U.S.C. §801).

This Court's determination of the constitutionality *vel non* of the challenged sections of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, will affect numerous pending cases filed under the questioned sections of the Act. The importance of a Supreme Court review cannot be gainsaid especially where the sections of the Act under which the petitioner was charged and the findings and declarations set forth in Section 101 of Title II, 21 U.S.C. §801, places the Federal Government four-square into intrastate narcotic activities.

A reading of the challenged statutes and the indictment makes it abundantly clear that petitioner was charged in language which would make an intrastate offense a Federal felony. It is not necessary to allege under the questioned statutes that the controlled substance was imported or distributed in interstate commerce or affected said commerce.

Prior to the passage of the Drug Abuse, Prevention and Control Act, Congress did not pass a statute simply restricting the sale of narcotics pursuant to its Constitutional power to tax. Instead, Congress levied a tax on narcotics and made it a crime to sell and distribute non-tax paid narcotics. This effectively accomplished the Congressional purpose but within Constitutional limitations. In like manner, Congress, in order to prohibit the importation and sale of narcotics, pursuant to its power to regulate foreign commerce, passed statutes restricting the importation of narcotics into the United States. Again, this effectively accomplished the Congressional purpose, but within constitutional limitations.

In the Act under consideration, however, Congress made certain findings and declarations in order to reach all proscribed drug activities whether foreign, interstate or intrastate in character. 21 U.S.C. §801(1)(7).

An examination of the "HEARINGS BEFORE THE SUBCOMMITTEE ON PUBLIC HEALTH AND WELFARE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE—HOUSE OF REPRESENTATIVES, PARTS I AND II, SERIAL NUMBERS 91-45 and 91-46, H.R. 11701 and H.R. 13743" ("Hearings"), as held during the second session of the 91st Congress, of which this Court may take judicial notice, *are completely devoid of any reference to or discussion of any relationship between possession of narcotics and interstate or foreign commerce. At no time during the "Hearings" was there any discussion of any connection whatsoever concerning a relationship between drug abuse and organized crime.*

It cannot be properly argued that, simply because Congress proclaimed, in Sec. 801 of Title 21, that it had made "Findings" relating the subject matter of the Act to interstate or foreign commerce, 21 U.S.C. §801(1)-(7), see Legislative History, 1970 U.S. Code Cong. & Adm. News, 4566, 4596, that such a recitation will suffice to avoid the constitutional difficulties. Notwithstanding the Congressional findings of fact and declarations contained in the Act, the constitutionality of the statutes in question are still, of course, subject to judicial inquiry to determine if said statutes are violative of the Constitution. *Leary v. United States*, 395 U.S. 6 (1969); *Perez v. United States*, 402 U.S. 146 (1971), and *United States v. Bass*, 434 F.2d 1296, 1300 (2nd Cir. 1970). It should be noted that the "findings" were part of the original bill and were inserted even prior to the holding of any "hearings."

Congress has the power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those interstate activities which have a demonstrably substantial effect on interstate commerce. Under the questioned statutes, however, a defendant can be convicted without any proof of interstate movement or the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. It is apparent that the framers of the Constitution never intended that the national Government might define as a crime and prosecute wholly local activity through the enactment of Federal criminal laws.[1] But see, *Perez v. United States*, 402 U.S. 146, 28 L.Ed.2d 686, 694, 91 S.Ct. 1357. Dissenting opinion, Mr. Justice Stewart.)

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[1]In testimony given by Mr. Ingersoll, the former director of the Bureau of Narcotics and Dangerous Drugs before a subcommittee of the Committee on Interstate and Foreign Commerce, Mr. Ingersoll stated:

> "Our enforcement practices at the Federal level are not directed to the masses of people who may be involved in this kind of abuse. Our focus is on the illicit trafficking systems, the criminal conspiracies which engage in the wholesale interstate and international distribution of these substances.
>
> "The effort that is made in respect to the kinds of people you are talking about is more properly, we feel, a State and local matter of concern. . . ."

The foregoing testimony indicates clearly that the head of the Federal Agency with the responsibility to enforce the Act did not want Congress to move into the area of intrastate narcotic violations. See Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce House of Representatives, Ninety-First Congress, Second Session on H.R. 11701 and H.R. 13783 at P. 127.

Further, the obvious extension of federal control into intrastate activities involving immense numbers of drug-related crimes will clearly alter federal-state relationships and overextend limited federal police resources. Cf. *Rewis v. United States*, 401 U.S. 808, 28 L.Ed.2d 493, 497, 91 S.Ct. 1056.[2]

Petitioner contends further that Amendment 10 of the United States Constitution is violated in that the police power reserved to the States is being infringed upon by the Act. The Act invades State's rights in the area of control of narcotics on an intrastate basis and, quite plainly, the state police rights in this area are replaced by Federal law and Federal power in contravention of the Constitution.

II

The Petitioner adopts the arguments in the Petition for Writ of Certiorari filed by Steven Zatsky on the 30th day of November, 1972. The Petitioner and Zatsky were co-defendants in the Trial Court and stood as co-appellants in the Fifth Circuit of the Court of Appeals. The issues presented in both Petitions are essentially the same and the Petitioner Scott Leisner respectfully submits that if Certiorari is granted on the Petitioner Zatsky's Petition for Certiorari the same should be applicable to him.

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[2]In the case of *United States v. Bass*, ____ U.S. ____, 30 L.Ed.2d 488, 92 S.Ct. ____, the indictment charged a violation of possession of firearms contrary to Section 120(a)(1) of the Omnibus Crime Control and Safe Streets Act. It was not alleged in the indictment that the firearm in question had been possessed "in commerce or affecting commerce." The statute provides for the conviction of a fe'on "who receives, possesses or transports in interstate commerce or affected commerce . . . any firearm . . . shall be punished as prescribed therein." Since the statute did not reach possession of a firearm not shown to have been "in commerce or affecting commerce," the question of whether Congress has overstepped the Constitutional powers under the Commerce Clause was never reached.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ALAN E. WEINSTEIN
Penthouse
420 Lincoln Road
Miami Beach, Florida

JAMES J. HOGAN
Penthouse
420 Lincoln Road
Miami Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of December, 1972, a copy of the above Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and to Robert Rust, Office of the United States Attorney, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

ALAN E. WEINSTEIN

JAMES J. HOGAN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2325
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SCOTT LEISNER and STEVEN ZATSKY,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(November 2, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: Appellants were convicted of violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§841(a)(1), 846. The sole

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409.

contention on appeal is that the Act is unconstitutional because it fails to require proof of a specific connection between the prohibited drugs and interstate commerce as a prerequisite for conviction. This identical contention has been considered and rejected by us several times. See *United States v. Amado Lopez*, 5 Cir., 1972, 459 F.2d 949; *United States v. Jesse Lane, et al.*, 5 Cir., 1972, ____ F.2d ____ [No. 71-3140, June 2]; *United States v. Alberto Lopez*, et al., 5 Cir., 1972, ____ F.2d ____ [No. 71-3227, June 6]; *United States v. Robert Gordon Mather*, 5 Cir., 1972, ____ F.2d ____ [No. 72-1280, August 2].

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2325
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SCOTT LEISNER and STEVEN ZATSKY,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

[Filed November 27, 1972]

ON PETITION FOR REHEARING

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Scott Leisner in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 72-167-CR-King

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21 USC, Section 846
M/S $25,000—15 years
21 USC, Section 841(a)(1)
M/S $25,000—15 years
18 USC, Section 2

UNITED STATES OF AMERICA

v.

SCOTT LEISNER, STEVEN ZATSKY, MARC SAPERSTEIN, JOSEPH MORENO, RICHARD DAVIS, LEONICIO RAFAEL ESTEVES, a/k/a Herman, and JOHN DOE, a/k/a Carlos

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[Filed March 9, 1972]

INDICTMENT

The Grand Jury charges:

COUNT I

On or about February 1, 1972, and continuing until February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

SCOTT LEISNER,
STEVEN ZATSKY,
MARC SAPERSTEIN,
JOSEPH MORENO,
RICHARD DAVIS,
LEONICIO RAFAEL ESTEVES,
a/k/a Herman, and
JOHN DOE, a/k/a Carlos,

did knowingly, intentionally and wilfully combine, conspire, confederate and agree, and have a tacit understanding with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to violate Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2, and it was the purpose and goal of such conspiracy to:

1. Negotiate for the sale of three pounds of a Schedule II narcotic controlled substance, to-wit: cocaine, for the price of $28,000.

2. Negotiate further for the sale of 6.6 pounds of a Schedule II narcotic controlled substance, to-wit: cocaine, for the price of $60,000.

3. Knowingly and intentionally possess with intent to distribute quantities of a Schedule II narcotic controlled substance, to-wit: cocaine.

4. Knowingly and intentionally distribute quantities of a Schedule II narcotic controlled substance, to-wit: cocaine.

The Grand Jury further charges that the said defendants, in furtherance of said conspiracy, and for the purpose of effectuating the goals of said conspiracy, did at or about the times and places hereinafter referred to, commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about February 14, 1972, at Miami, Florida, defendant Marc Saperstein telephoned an agent of the Bureau of Narcotics and Dangerous Drugs.

2. On or about February 14, 1972, at Miami, Florida, defendants Marc Saperstein, Richard Davis and John Doe a/k/a Carlos met with agents of the Bureau of Narcotics and Dangerous Drugs at Pappy's Pizza, 1118 South Dixie Highway.

3. On or about February 29, 1972, at Miami, Florida, defendants Scott Leisner and Steven Zatsky met with an agent of the Bureau of Narcotics and Dangerous Drugs at the Vizcaya Towers Apartments, 150 S.E. 25th Road.

4. On or about February 29, 1972, at Miami, Florida, defendants Scott Leisner, Joseph Moreno and Leonicio Rafael Esteves a/k/a Herman were at a residence at 1605 N.E. 178th Street.

All in violation of Title 21, United States Code, Section 846.

COUNT II

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

MARC SAPERSTEIN,
RICHARD DAVIS, and
JOHN DOE, a/k/a Carlos,

did knowingly and intentionally possess with intent to distribute approximately 1.29 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about February 14, 1972, at Miami, Dade County in the Southern District of Florida, the defendants,

MARC SAPERSTEIN,
RICHARD DAVIS, and
JOHN DOE, a/k/a Carlos,

did knowingly and intentionally distribute approximately 1.29 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IV

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendant,

SCOTT LEISNER,

did knowingly and intentionally possess with intent to distribute approximately .48 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT V

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendant,

SCOTT LEISNER,

did knowingly and intentionally distribute approximately .48 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VI

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO and
SCOTT LEISNER,

did knowingly and intentionally possess with intent to distribute approximately two grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title

21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VII

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO and
SCOTT LEISNER,

did knowingly and intentionally distribute approximately two grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VIII

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO,
SCOTT LEISNER, and
LEONICIO RAFAEL ESTEVES,
a/k/a Herman,

did knowingly and intentionally possess with intent to distribute approximately 86 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IX

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO,
SCOTT LEISNER, and
LEONICIO RAFAEL ESTEVES,
a/k/a Herman,

did knowingly and intentionally distribute approximately 86 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL
EDWARD A. RIDOLPH SR.
FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY
By MICHAEL P. SULLIVAN
Michael P. Sullivan
Assistant United States Attorney